No. 15-317

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PAUL J. MURPHY, Acting Regional Director for the Third Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee,

v.

HOGAN TRANSPORTS, INC.

Respondent-Appellant

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF PETITIONER-APPELLEE
NATIONAL LABOR RELATIONS BOARD

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I. COUNTERSTATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction in the underlying case pursuant to § 10(j) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(j).[1] On January 20, 2015, on remand from this Court, the Honorable Gary L. Sharpe, United States District Court Judge for the Northern District of New York in Case No. 13-mc-64, issued a summary order granting the Acting Regional

[1] See the statutory addendum, attached to this brief, for the full text of § 10(j).

Director's ("the Director") petition for a temporary injunction under § 10(j). (JA 365.)[2] Hogan Transports, Inc. ("the Company") filed a timely notice of appeal from this final order on February 4, 2015. This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1).

II. COUNTERSTATEMENT OF THE ISSUE

The District Court correctly concluded that there is reasonable cause to believe that the Company unlawfully undermined employee support for the Union shortly before a scheduled Board-conducted election by threatening employees with job loss if they selected the Union as their collective-bargaining representative, granting employees a wage increase, interrogating employees about their Union activities, and discharging an open Union adherent. These serious violations caused fear among employees and chilled their union activity, preventing a fair union election. Did the district court abuse its discretion in concluding that an interim bargaining order was necessary to protect employees' § 7 rights and preserve the Board's ability to issue a final remedy in this case?

[2] "JA" references are to the Joint Appendix filed with the Company's brief. "Br." references are to the Company's opening brief.

III. COUNTERSTATEMENT OF THE CASE

A. Procedural History

This case is before the Court on the Company's appeal from an order of the United States District Court for the Northern District of New York, the Honorable Gary L. Sharpe, District Judge, granting the Board's petition for a temporary injunction under § 10(j) of the Act. (JA 365.)

On October 25, 2013, the Director filed a petition for a temporary injunction under § 10(j) seeking interim remedies, including reinstatement and a bargaining order, pending Board adjudication of the underlying administrative complaint. (JA 10.) The petition was predicated on a consolidated unfair-labor-practice complaint issued by the Director on August 30, 2013, alleging that the Company had violated §§ 8(a)(1), (3), and (5) of the Act. Based on the Union's card majority, the Director sought a remedial bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), because the Company's violations prevented the holding of a fair election. (JA 15.)

On November 22, 2013, District Judge Sharpe, in Case No. 13-mc-64, granted in part the Director's petition, but denied the interim bargaining order. (JA 273.) The Director appealed. On February 26, 2014, an Administrative Law Judge ("ALJ") of the Board issued his Decision and Recommended Order in the underlying Board case. (JA 284.) The ALJ found that the Company violated

§§ 8(a)(1) and (3) by, *inter alia*, threatening employees with job loss if they voted for the Union, granting a wage increase prior to the election, and discharging Mansfield Teetsel in retaliation for his Union activity. (JA 301.) The ALJ concluded that these violations would make a fair election unlikely, and recommended a *Gissel* bargaining order. (JA 301.) The ALJ's decision was filed with the district court, and the underlying case is currently pending on exceptions to the Board in Washington, D.C.

On October 14, 2014, this Court vacated the district court's denial of the bargaining order and remanded with instructions to further explain why an interim bargaining order was not just and proper, considering the egregious nature of the Company's "hallmark" violations of the Act. *Murphy v. Hogan Transp. Co.*, 581 F. App'x 36 (2d Cir. 2014). This Court noted that the Company had not challenged the district court's "reasonable cause" findings on appeal and that the Court was taking them "as given." *Murphy*, 581 F. App'x at 37. This Court recognized the violations here as "hallmark" violations that are "highly coercive" and found that the district court had not "actually grappled with the seriousness of the violations." *Id.* Instead, there was an "unexplained disconnect between the harm found by the district court and the interim remedy imposed." *Id.* at 38. This Court concluded that the remedy imposed "appears inadequate to restore the pre-violation status quo" and that instead, the district court's order froze the unlawfully created

"present situation." *Id*. The Court ordered the district court, on remand, to explain why a bargaining order "is warranted or unwarranted in light of the serious violations it found, and the apparent disconnect between these violations and the other interim relief afforded" and to consider the administrative transcript "which was before the court at the time of its initial decision" as well as the subsequent ALJ decision. *Id*.

On remand, in accordance with this Court's order, the district court again considered the original record, as supplemented by the ALJ's decision. The court determined that an interim *Gissel* bargaining order was just and proper in order to remedy the Company's violations and restore the status quo ante. (JA 372.) In particular, the district court noted that the ALJ decision "substantially undermine[d] the factual basis that the court relied upon in denying an interim bargaining order" in the first proceeding. (JA 367.) Thus, the district court observed, the ALJ decision made clear that the Company's predictions concerning losing its contract with Save-A-Lot in the event of unionization were "not supported by objective facts," and therefore violated § 8(a)(1). (JA 368.) In making this determination, however, the district court specifically stated that the ALJ decision was persuasive, not dispositive, and that the district court had not delegated its decision-making "to another branch of government." (JA 368.)

B. Background Facts

1. Hogan Transports' Employees Begin Organizing and a Majority Authorize the Union to Represent Them

Hogan Transports, headquartered in St. Louis, Missouri, provides trucking services for its customers throughout the country. This case involves the Company's twenty-nine drivers who transport grocery products for the Save-A-Lot grocery chain and who work out of the Save-A-Lot distribution center/warehouse located in West Coxsackie, New York. Save-A-Lot is the Company's only customer at this location. (JA 285.)

In May 2013,[3] driver Robert Sansone began organizing the Company's drivers on behalf of Teamsters Local 294, International Brotherhood of Teamsters ("the Union"), and on June 2 the employees had their first meeting. (JA 286.) By the end of the meeting, the Union had obtained 14 signed authorization cards. (JA 286.) On June 3, the Union filed an election petition with the Board's Regional Office by which it sought to represent the Company's drivers. (JA 286.) Simultaneously, by letter dated June 3, Union president John Bulgaro requested that the Company voluntarily recognize the Union and meet to begin the process of collective bargaining. (JA 286.) The Company declined to do so and the parties thereafter entered into a Stipulated Election Agreement in which they agreed to a

[3] All remaining dates are in 2013, unless otherwise noted.

Board-conducted election to be held on July 12. (JA 286-87.) Between June 7 and June 13, four additional drivers signed authorization cards for a total of eighteen signed cards. (JA 286.) The parties stipulated that there were twenty-nine drivers in the appropriate unit. (JA 287.) Thus, by June 13 the Union had secured cards from a majority of the drivers.

2. The Company Immediately Threatens Drivers with Job Loss in Interrogations and anti-Union Meetings and Announces a Wage Increase; the Union Loses Employee Support

Within a week of the Union's first organizing meeting, the Company sent its Director of Operations, Charles Johnson, to the West Coxsackie facility. Johnson — who works out of the Company's corporate headquarters in St. Louis — had not visited the West Coxsackie facility since three years earlier, when the drivers made a previous attempt to organize. (JA 286.)

At the facility, Johnson engaged each of the Company's drivers in one-on-one conversations, including James Young, Virgil Smith, and Steve Ianno. (JA 286-87.) During the week of June 10, in a private conversation with Young, Johnson asked him what was going on and then informed him that the Union had filed an election petition and warned that if the Union came in, Save-A-Lot was already prepared to bring in a third party carrier and the Company would lose the Save-A-Lot contract; Young understood Johnson's comment to mean that the drivers would lose their jobs. (JA 286.) In a subsequent conversation with Smith,

Johnson said that Save-A-Lot did not want the Union, the Company did not want the Union, and if the Company did go Union, the drivers would probably lose their jobs because Save-A-Lot would throw them out. (JA 286.)

Johnson also approached Ianno that week. (JA 286-87.) With Johnson was the Company's Vice President of Safety and Driver Services, Tom Lansing. Like Johnson, Lansing had arrived from the Company's headquarters in St. Louis. Johnson began the conversation with Ianno by asking him "[w]hat's going on?"; "[why] are we back here again?" (JA 287.) When Ianno replied that the drivers were not happy, there was a lot of favoritism, and in the past three years the Company had done nothing about it, Johnson told him that neither Save-A-Lot nor the Company wanted the Union there. (JA 287.) Lansing added that if the Union came in, all of the drivers were going to be out of work and, addressing Ianno, then asked, "[w]here are you going to be?" (JA 287.) Johnson had similar conversations with drivers Shane McDonald and Alan Field, and in addition driver Robert Sansone overheard Johnson telling another driver that if the Union came in, the Company would lose the work at the Save-A-Lot warehouse. (JA 287.)

The following week, on June 19, the drivers were required to attend one of three meetings that the Company held over the course of the day. (JA 288.) The meetings were conducted by the Company's President, David Hogan. (JA 288.) During the meetings, which lasted between two to two and a half hours each,

Hogan announced that the Company would be giving the drivers an across-the-board wage increase of two cents per mile beginning on July 1.[4] (JA 288.) Hogan also repeatedly expressed his strong opposition to the employees' organizing effort. In his remarks, which Young recorded on his smart phone,[5] Hogan told the drivers, "I don't know how to be more direct, but I think our business here is in jeopardy if the [U]nion comes in. It's not a threat, it's just my opinion with my discussions with Save-A-Lot when they remind me of how they operate. They don't want to operate in a union environment[.]" (JA 288.) After an employee voiced his view that if the Union came in they would all be out of a job, Hogan stated, "*I agree 110%* with that and I am just being honest with you." (emphasis added) (JA 288.) Hogan additionally remarked that, "[a]gain, my opinion is we got to continue to work together because if you guys organize there is a strong possibility that we lose the business." (JA 288.)

On June 23, when the Union held its second organizing meeting, many of the drivers who were at the first meeting were not in attendance. (JA 46-47.) The six or so drivers who did attend told the Union that the Company was engaging in

[4] The wage increase equated to an additional $40.00 to $60.00 per week depending on the number of miles driven. (JA 288.)

[5] A transcript of the meeting was made by an independent company, Burke Recording. It was admitted into the administrative record as GC Ex. 10. (JA 97.)

scare tactics and their coworkers were becoming intimidated and afraid. (JA 55-56, 68.) The drivers discussed being constantly barraged by anti-Union rhetoric and threatened that the Company would close and they would lose their jobs if the Union won the election. (JA 46, 55-56.) The drivers feared that because of this, the Union was losing support. (JA 68.)

3. The Company Continues its Anti-Union Campaign by Terminating an Open Union Supporter and Holding Additional Anti-Union Meetings; the Union Cancels the Election

Mansfield Teetsel was employed as a tractor-trailer driver for the Company from 2004 to June 2011 when he left to drive for another company. (JA 297.) He returned to work for Hogan Transports in December 2011, and was rehired at a lower wage rate than he previously had earned; while attending one of the anti-Union meetings held by President Hogan on June 19, Teetsel commented that this made him bitter. (JA 138-39, 297.) Later on in the meeting, when Hogan stated that the Company did not have any union drivers, Teetsel responded, "Hmm, not now. Not yet." (JA 152.) Teetsel was also active in the Union campaign, soliciting cards from two of his co-workers. (JA 297.)

At the end of June, Teetsel had a conversation with Operations Manager Jim Lauda in which Teetsel stated that he had found a full-time job with another trucking firm but wanted to continue driving for the Company on a part-time casual basis. (JA 297.) On July 5, Teetsel told Lauda that he had reconsidered and

wanted to stay on with the Company full time. (JA 297.) Lauda noted that he had not yet notified headquarters so it would be fine. (JA 297.) On July 6, Teetsel received a phone call from Lauda informing him that he had been terminated. (JA 297.) At the time of Teetsel's termination, the Company was advertising for full-time and part-time drivers and offering a $4,000.00 bonus upon being hired. (JA 297.) Tom Lansing, the Company's Vice President of Safety and Driver Services, testified that Teetsel was terminated because Lansing thought a new employee would appreciate the job more. (JA 297.) Teetsel's coworkers believed that he was discharged by the Company because he openly supported the Union. (JA 230.)

About a week before the scheduled election, Union president Bulgaro asked Young whether the election should be cancelled. (JA 230.) Young told him that many of the drivers were scared and he did not believe that a fair election was possible. (JA 230). Young's belief was based, in part, on conversations he had had with three of his fellow drivers. One driver had told him that she was afraid of losing her job because if the Union won the election Save-A-Lot would pull out. (JA 230.) Another driver told Young that he was not even going to vote because he would lose his job if the Union won. (JA 230.) Yet another of Young's coworkers said that Save-A-Lot would cancel the contract if the drivers unionized. (JA 230.)

On around July 8, Hogan, Johnson, and Lansing returned to the West Coxsackie facility and held additional anti-Union meetings.[6] At the meetings, which Lauda also attended, Hogan reiterated his opposition to the Union and stated that if the drivers selected the Union, "there won't be jobs." (JA 77.) Hogan also distributed a letter to the drivers urging them to reject the Union. In the letter, he stated that, in his opinion, the Union would cost the employees money and put their jobs at risk by making the company inefficient. (JA 290.) He also stated that many of the drivers had signed authorization cards "without realizing the mistake they were making," and urged them to "clear up your mistake by voting NO!" (JA 290.)

On July 8 the Union sent a letter to the Board's Regional Office requesting that the July 12 election be cancelled because many of the drivers were intimidated and afraid and the Union did not believe that a fair election was possible. (JA 48, 227.) In August, several of the drivers asked management officials how they could get their authorization cards back and a number of the drivers subsequently contacted the Union or the Board's Regional Office to do so. (JA 47, 86-96, 228.)

[6] Young also recorded one of these meetings on his smart phone; at the administrative hearing, the recording was played and made a part of the administrative record. (JA 69-84.)

IV. STANDARD OF APPELLATE REVIEW

This Court will reverse a § 10(j) injunction only if the district court's factual findings were "clearly erroneous," *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1030 (2d Cir. 1980), the court's resolution of legal issues pertinent to "reasonable cause" was incorrect, *Kaynard v. Palby Lingerie*, 625 F.2d 1047, 1051 (2d Cir. 1980), or the relief granted was an abuse of the court's discretion. *Id.*; *Mego,* 633 F.2d at 1030. *See also Hoffman v. Inn Credible Caterers*, 247 F.2d 360, 362 (2d Cir. 2001).

V. SUMMARY OF THE ARGUMENT

The district court properly found reasonable cause to believe that the Company committed serious §§ 8(a)(1) and (3) violations that were highly coercive, prevent a fair election, and warrant a remedial bargaining order. There is ample evidence, which was largely unchallenged in the prior proceeding, that the Company unlawfully threatened employees with job loss if they joined or assisted the Union, promised and granted a wage increase to dissuade employees from supporting or voting for the Union, interrogated employees about their Union activities, and discharged an employee because of his support for the Union. The ALJ decision finding the relevant violations and recommending a cease and desist order, reinstatement, and a remedial bargaining order further bolsters the district court's reasonable cause findings. Indeed, these findings were uncontested and this

Court's remand instructed the district court to solely consider why an interim bargaining order was not "just and proper."

Nevertheless, the Company now essentially argues that there is not reasonable cause to believe that a bargaining order is warranted. The Company argues that the district court erred in relying on the ALJ decision, and that this Court should allow the Company a full evidentiary hearing, at which the Company claims it will be able to demonstrate that many of the alleged violations were not sufficiently coercive to warrant a bargaining order remedy. The Company's arguments ignore that the violations in this case are precisely the type of "hallmark" violation repeatedly recognized by the Board and the courts as having a highly coercive effect that interferes with employee free choice. The Company also ignores that the coercive effect of the violations was confirmed by evidence that the Company's misconduct caused a decline in employees' Union activity and support. Moreover, the Company's arguments are inconsistent with this Court's remand and ignore the relatively insubstantial burden the Region Director carries in demonstrating "reasonable cause," the deferential role of the district court in reviewing the Director's § 10(j) petition rather than conducting its own fact-finding investigation, and the bolstering effect of the ALJ decision finding that a remedial bargaining order is warranted.

The district court also correctly determined that an interim bargaining order is just and proper. The Board will likely issue a final *Gissel* bargaining order, and an interim bargaining order is necessary to both remove the chilling impact of the Company's violations on employees' willingness to continue supporting the Union and to protect the Board's ability to issue an effective final order, including an enforceable bargaining order. Absent an interim bargaining order, employees' support for the Union will predictably continue to erode, and financial and other benefits of Union representation pending final Board adjudication will be irretrievably lost. At that point, whether the Board issues a final bargaining order or sets a new representation election, the Union will be required to re-establish its support from a position of disadvantage caused by the Company's unlawful conduct.

In contrast to these well-recognized harms, there is no harm to the Company from an interim bargaining order. The Company's claim that employee turnover and changes to the composition of the bargaining unit weigh against imposition of a bargaining order are misplaced. This Court and other courts of appeals have only considered employee turnover relevant in the context of *final* bargaining orders, which have a fundamentally different remedial purpose than *interim* bargaining orders, which are meant to restore the status quo ante and preserve the ability of

the Board to issue a final remedy. Thus, affirming the interim bargaining order now offers the best chance of an effective final Board remedy.

VI. ARGUMENT

A. The Applicable § 10(j) Standards

Section 10(j) authorizes the United States district courts to grant temporary injunctions pending the Board's resolution of the underlying unfair labor practice charges. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. *See Kreisberg v. HealthBridge Management, LLC*, 732 F.3d 131, 143 (2d Cir. 2013); *Palby Lingerie*, 625 F.2d at 1055; *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 38 (2d Cir. 1975), citing S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at *Legislative History of the Labor Management Relations Act of 1947*, 414, 433 (Government Printing Office 1985). Thus, § 10(j) was intended to prevent the frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *See, e.g.*, *Seeler*, 517 F.2d at 37-38.

To resolve a §10(j) petition, a district court in the Second Circuit considers whether there is "reasonable cause to believe" that a respondent has violated the Act, and whether temporary injunctive relief is "just and proper" under the

circumstances. *See, e.g., Kreisberg*, 732 F.3d at 141-42; *Hoffmann*, 247 F.3d at 364-65 ; *Silverman v. J.R.L. Food Corp.*, 196 F.3d 334, 335 (2d Cir. 1999).

1. The "reasonable cause" standard

In determining whether there is reasonable cause to believe that the Act has been violated, a district court may not decide the merits of the case. *See Hoffman*, 247 F.3d at 365; *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1032-33 (2d Cir. 1980). Rather, the court's role is limited to determining whether there is "reasonable cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals." *Id.* at 1033 (quoting *McLeod v. Bus. Mach. & Office Appliance Mech. Conference Bd.*, 300 F.2d 237, 242 n.17 (2d Cir. 1962)). District Courts hearing § 10(j) injunction petitions are not to resolve contested factual issues. *See Palby Lingerie*, 625 F.2d at 1051-52 n.5; *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570-71 (7th Cir. 1996). Instead, a Regional Director's version of the facts "should be given the benefit of the doubt" (*Seeler*, 517 F.2d at 37) and, together with the inferences therefrom, "should be sustained if within the range of rationality" (*Mego Corp.*, 633 F.2d at 1031). *See also J.R.L. Food Corp.*, 196 F.3d at 335.

Similarly, on questions of law, the district court "should be hospitable to the views of the [Regional Director], however novel." *Mego Corp.*, 633 F.2d at 1031 (quoting *Danielson v. Jt. Bd. of Coat, Suit & Allied Garment Workers' Union,*

I.L.G.W.U., 494 F.2d 1230, 1245 (2d Cir. 1974)). The Regional Director's legal position should be sustained "unless the [district] court is convinced that it is wrong." *Palby Lingerie*, 625 F.2d at 1051. In sum "appropriate deference must be shown to the judgment of the NLRB, and a district court should decline to grant relief only if convinced that the NLRB's legal or factual theories are fatally flawed." *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054 (2d Cir. 1995).

The Administrative Law Judge's ("ALJ) findings and legal conclusions in the underlying administrative case supply "a useful benchmark" against which to weigh the strength of the Director's theories of violation. *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 288 (7th Cir. 2001). The "preponderance of the evidence" standard applied by the ALJ is a higher burden of proof than the "reasonable cause" test. Therefore, it is appropriate for courts to rely on the ALJ's findings and conclusions. *See Seeler*, 517 F.2d at 37 n.7; *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 238 (6th Cir. 2003); *Bloedorn*, 276 F.3d at 288. Indeed, the "ALJ's factual findings are part of the record and cannot be ignored." *J.R.L. Food Corp.*, 196 F.3d at 335.

In a case such as this one, the reasonable cause inquiry includes the question of whether the violations committed are so coercive that the Board will probably conclude that they support the issuance of a remedial bargaining order.

2. The "just and proper" standard

Once reasonable cause is established, § 10(j) relief is "just and proper" where the unfair labor practices threaten to render the Board's processes ineffective by precluding a meaningful final remedy (*Mego*, 633 F.2d at 1034 (discussing *Seeler*, 517 F.2d at 37-38)); where interim relief is the only effective means to preserve or restore the status quo as it existed before the violations (*Seeler*, 517 F.2d at 38); or where the passage of time might otherwise allow the respondent to accomplish its unlawful objective before being placed under any legal restraint (*Palby*, 625 F.2d at 1055). *Accord Silverman v. Major League Baseball Player Relations Comm.*, 880 F. Supp. 246, 255 (S.D.N.Y.), *affirmed*, 67 F.3d 1054 (2d Cir. 1995). In determining whether temporary injunctive relief is "just and proper," courts apply traditional equitable principles, "mindful to apply them in the context of federal labor laws." *Kreisberg*, 732 F.3d at 141 (quoting *Hoffman*, 247 F.3d at 368).

Where the Director has established reasonable cause to believe that the Board will issue a remedial bargaining order, the "just and proper" inquiry is whether an interim bargaining order is necessary to preserve the status quo ante of majority Union support, protect employee rights, and protect the effectiveness of the Board's final remedy.

B. There is Strong Cause to Believe that a Remedial Bargaining Order is Appropriate

1. The Board is likely to issue a remedial bargaining order

The district court properly found reasonable cause to believe that the Company unlawfully threatened employees with job loss if they joined or assisted the Union, promised and granted a wage increase to dissuade employees from supporting the Union, coercively interrogated employees about their Union activities, and discharged driver Mansfield Teetsel because of his Union support. (JA 278-79.) As this Court noted in the prior proceeding, these findings were "largely unchallenged" before the district court, and the Company did not argue on appeal before this Court that those findings were erroneous. *Murphy v. Hogan Transp. Co.*, 581 F. App'x 36, 37 (2d Cir. 2014). Indeed, because of the uncontested nature of these findings, this Court took the findings as "given" and the scope of this Court's remand to the district court was limited to whether or not a *Gissel* bargaining order was just and proper. *Id*. at 39.

Further, there is strong cause to believe that these uncontested violations are so serious and substantial that the Board's traditional remedies would be unable to erase the effects of the violations and to restore the conditions necessary to conduct a fair election and that, therefore, the Board will issue a remedial bargaining order under the *Gissel* doctrine. Although the district court did not explicitly find reasonable cause to believe that the Board will issue a remedial bargaining order,

that finding is implicit in the court's reasoning. The district court noted that the ALJ found "hallmark" violations sufficient to make "a fair and free election improbable" and necessitate a bargaining order, and that those ALJ findings were "persuasive." (JA 368.) The court's implicit finding of reasonable cause for a remedial bargaining order is well supported by the record and case law.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court held that in the appropriate case, the Board may disregard the normal election process for certifying a union and may rely on authorization cards establishing a union's majority support to order an employer that has engaged in sufficiently serious and pervasive unfair labor practices to recognize and bargain with the Union without an election. *Gissel* bargaining orders are appropriate in cases with outrageous and pervasive employer conduct or those marked by "less pervasive practices" which nonetheless have the tendency to undermine a union's majority strength and impede the fair election process. *See Gissel*, 395 U.S. at 613-615. *See also NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-213 (2d Cir. 1980); *Windsor Industries, Inc.*, 730 F.2d 860, 865 (2d Cir. 1984).

In determining the need for a bargaining order, the Board and the courts recognize that certain types of violations, commonly called "hallmark violations," are so coercive that their presence will support the issuance of a bargaining order. *Jamaica Towing*, 632 F.2d at 212-13. In such cases, "the seriousness of the

conduct . . . justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the work force." *Id*. By threatening employees with job loss, granting a significant, unscheduled across-the-board wage increase during an organizing campaign, and discharging Union supporter Mansfield Teetsel, the Company engaged in multiple "hallmark" violations. *Id.* Indeed, this Court acknowledged in the prior proceeding that these violations are highly coercive "hallmark" violations. *Murphy*, 581 F. App'x at 38.

The cumulative effect of these violations demonstrates a classic "carrot and stick" approach. The Company attempted to buy employees off with a wage raise immediately after it first heard of Union activity, and thereafter, emphasizing its ability to punish, it coerced its employees by discharging a union supporter. These complementary, coercive tactics have a lasting impact on employees and support the issuance of a bargaining order. *See America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), *enforced* 44 F.3d 516 (7th Cir. 1995), *cert. denied* 515 U.S. 1158 (1995) ("carrot and stick" approach supported *Gissel* bargaining order). Further, the small size of the bargaining unit makes it more likely that the entire unit has been affected by these violations with the result that the holding of a fair election is impaired, if not impossible. *NLRB v. Solboro Knitting Mills, Inc.*, 572 F.2d 936, 944 (2d Cir. 1978); *NLRB v. General Stencils, Inc.*, 438 F.2d 894 (2d

Cir. 1971) *Accord*: *Justak Bros. and Co. v. NLRB*, 664 F.2d 1074, 1082 (7th Cir. 1981) (79-person unit considered "small," *Gissel* bargaining order upheld).

Upper management's direct participation in the unlawful campaign further reinforces the coerciveness of the conduct, and together with the serious and widespread nature of these violations, makes it likely that these violations will have a continuing impact on all employees. *See NLRB v. Q-1 Motor Express, Inc.* 25 F.3d 473, 481 (7th Cir. 1994) (noting amplified effect of unfair labor practices when committed by high-ranking officials, especially on small bargaining units); *NLRB v. Anchorage Times Pub. Co.*, 637 F. 2d 1359, 1370 (9th Cir.) (bargaining order warranted where "high level management personnel" committed violations and refused to disavow their coercive conduct); *Amazing Stores, Inc. v. NLRB*, 887 F.2d 328, 330 (D.C. Cir. 1989). The coercive impact of upper management's participation is heightened here, where the Company's Director of Operations appeared at the facility only twice in three years — when the employees showed an interest in unionization.

Given these repeated hallmark violations by the Company, the fact that eighteen of the Company's twenty-nine drivers signed authorization cards before the Company's unlawful anti-Union campaign is a better indicator of true employee sentiment than an election conducted in the aftermath of such coercive conduct. The ALJ so recognized and concluded that a remedial bargaining order is

warranted in this case. The ALJ noted that the Company had committed a number of "hallmark" violations "sufficiently serious to make the holding of a free and fair election improbable" and that were very similar to the violations that led the Board to issue and the D.C. Circuit to enforce a *Gissel* bargaining order in *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57 (Aug. 25, 2011), *enforced sub nom. Matthew Enterprise Inc. v. NLRB*, 498 F. App'x 45 (D.C. Cir. 2012). Accordingly, there is strong cause to believe that, as recommended by the ALJ, the Board will issue a remedial *Gissel* bargaining order in this case.

2. The Company wrongly contends that the violations in this case are not "highly coercive" and that the district court made procedural errors that preclude a "reasonable cause" finding

The Company contends that the hallmark violations in this case, described by this Court as "highly coercive" in the *Murphy* decision, are not serious enough to preclude a fair election. (Br. 46-49.) The Company's argument ignores the abundant case law discussed above, in the ALJ's decision, and in this Court's *Murphy* decision, recognizing that threats, interrogations, wage increases, and discharge of a union supporter are the type of violations that have long-lasting impact and prevent an untainted, free employee choice through a fair election. It also ignores circumstances that increase the violations' impact, such as the involvement of high management officials and the fairly small size of the unit. The coercive impact of these violations is confirmed by the evidence, described above,

that after the Company's misconduct there was decreased Union activity, statements of fear by employees, and revocation of Union authorization cards by some employees.

In the face of this strong evidence and case law, the Company resorts to meritless procedural attacks. The Company argues that the district court abused its discretion by relying on the ALJ Decision without taking into evidence the complete administrative record, despite this Court's clear instruction that the court consider the transcript already "before it" along with the ALJ decision. It also contends that the district court should have allowed the Company a full evidentiary hearing concerning the alleged unfair labor practices in question. (Br. 46-53.) If allowed such a hearing, the Company claims it would be able to demonstrate, *inter alia*, that a substantial portion of the testimony in this case is unsupported hearsay, that employees did not actually feel coerced by the Company's unlawful threats of job losses and that, therefore, there is no need for a remedial bargaining order in lieu of a union election. (Br. 50-56.) These arguments misunderstand the purpose of a § 10(j) injunction and the role of the district court in reviewing the Board's petition for such an injunction.

a. The district court properly relied on the partial record and the ALJ decision.

The Company misses the mark by protesting that the district court did not have the full administrative record of the ALJ hearing before it on remand. Given the "reasonable cause" standard and the availability of the ALJ decision, there was no need for the district court to accept into the record the rest of the transcript. The "reasonable cause" threshold is "relatively insubstantial," *Ahearn*, 351 F.3d at 237, and requires the Regional Director to merely offer a version of events that must be sustained if "within the range of rationality." *Mego Corp.*, 633 F.2d at 1031. The district court cannot resolve contested factual issues, *Palby Lingerie*, 625 F.2d at 1051-52 n.5, or decide the merits of the case. *Hoffman*, 247 F.3d at 365. The Company's claim that the district court should have made "its own independent analysis" of the coercive impact of the violations and the appropriateness of a bargaining order (Br. 48) is therefore contrary to § 10(j) law.

Moreover, the ALJ decision, made after that fact finder considered the totality of the administrative transcript, including the parts the Company complains are missing from the district court record, bolsters the "reasonable cause." *Seeler*, 517 F.2d at 37, n. 7; *Ahearn*, 351 F.3d at 238 ("the ALJ's [subsequently-issued] ruling lends further support to the…district court's decision"). As this Court has held, the ALJ decision is part of the record and cannot be ignored." *J.R.L. Food Corp.*, 196 F.3d at 335. The Company's contention that the district court should

not have relied on the ALJ decision, (Br. 48), is contradicted by extensive precedent emphasizing the value of an ALJ decision, and, indeed, this Court's own remand in this case expressly instructing the district court to consider it. *J.R.L. Food Corp.*, 196 F.3d at 335; *Bloedorn*, 276 F.3d at 288; *Seeler*, 517 F.2d at 37 n.7; *Ahearn*, 351 F.3d at 238.[7]

Moreover, the Company has not established any legal errors made by the ALJ that would warrant ignoring his decision. The Company's only challenge to the ALJ's *Gissel* analysis is that the ALJ did not consider the district court's original injunction in weighing the need for a remedial bargaining order. (Br. 54.) The Company is mistaken in arguing that the ALJ's analysis was deficient on that account. The original injunction issued by the district court was on appeal to this Court, an appeal in which the Regional Director argued that the district court's limited injunction was insufficient to counteract the pernicious effects of the Company's violations. As this Court eventually concluded, the partial injunction originally issued by the district court showed a "disconnect" between the harm and

[7] The Company wrongly contends that this Court should not consider the ALJ decision because it was not part of the original record when the district court first considered the case. (Br. 13.) While the ALJ's decision regarding the underlying unfair labor practices was not part of the original record below, this Court may take judicial notice of it. *See Overstreet v. United Bhd. Of Carpenters*, 409 F.3d 1199, 1203 n. 7 (9th Cir. 2005); *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 157 n. 3 (1st Cir. 1995). *See also Seeler*, 517 F.2d at 37 n. 7 (relying on ALJ decision issued after district court order).

the remedy and "appear[ed] inadequate" to erase the coercive effects of the violations. Moreover, the fact "that there may have been some compliance with a court injunction does not negate" the ALJ's conclusion that a bargaining order is necessary "to remedy substantial unfair labor practices." *R.L. White Company, Inc.*, 262 NLRB 575, 581 (1982). Therefore, the ALJ committed no error in disregarding the partial injunction as a palliative measure; his failure to do so gives no grounds to disregard his conclusion that a bargaining order is warranted.

In short, given the reasonable cause standard, the predictive weight of the ALJ decision, and the terms of this Court's remand, the Company cannot show that the district court abused its discretion by considering the ALJ decision but not the full administrative record, or that it was prejudiced in any way by the absence of the full administrative record.

b. The district court did not abuse its discretion by denying an evidentiary hearing on the coerciveness of the violations

The Company also argues that it should have been afforded a full evidentiary hearing to examine the evidence upon which the unfair labor practice allegations are predicated, and to determine how "coercive" its unlawful conduct was. (Br. 50-53.) However, as discussed above, it is not the role of the district court to pass on the merits of the underlying allegations, but rather to determine if the Board will eventually find merit to the unfair labor practices and issue a

remedial bargaining order. *See Kreisberg*, 732 F.3d at 141("[t]he district court does not need to make a final determination whether the conduct in question constitutes an unfair labor practice; reasonable cause to support such a conclusion is sufficient"); *see also Levine v. C&W Mining Co., Inc.*, 610 F.2d 432 (6th Cir. 1979) ("[t]he regional director [is] not required to prove the commission of unfair labor practices; that is a determination finally to be made by the Board pursuant to its regular procedures"). Indeed, one of the primary purposes of § 10(j) is to *avoid* replicating Board processes in order to swiftly restore the status quo and preserve the Board's ability to eventually issue an effective remedy. *See Palby Lingerie*, 517 F.2d at 38 ("time is usually of the essence" in instances where employer engaged in egregious conduct and has made fair election impossible) (internal quotations and citations omitted); *Ahearn*, 351 F.3d at 237 ("fact-finding is inappropriate in the context of a district court's consideration of a 10(j) petition").

The Company fails to show any compelling reason why the district court should have accepted new evidence of the coercive effect of the violations. The Company contends that an evidentiary hearing would allow it to inquire into the Director's basis for concluding that a bargaining order is appropriate, as well as into employees' knowledge of and reaction to the violations. (Br. 52.) The evidence the Company seeks to adduce is immaterial. The Director's rationale for seeking a remedial bargaining order is completely irrelevant. And, neither the

Board nor the courts rely on employees' subjective impressions regarding unfair labor practices in determining whether a bargaining order is appropriate. Rather, the Board and the courts apply an objective test under *Gissel* that examines whether the totality of the circumstances indicates that the violations are likely to prevent a free and fair election. *Altman Camera Co., Inc. v. NLRB*, 511 F.2d 319, 323 n. 4 (7th Cir. 1975) (approving Board's endorsement of objective rather than subjective test for measuring whether a *Gissel* bargaining order is appropriate). Moreover, any such evidence would not be part of the administrative record; it would not be considered by the Board or this Court on review. *See NLRB v. Johnson*, 310 F.2d 550, 552 (6th Cir. 1962) (per curiam); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1264 (9th Cir. 1977). Therefore, it could have no bearing on whether there is reasonable cause to believe that the Board will issue a remedial bargaining order in this case. The partial administrative record and the ALJ decision are more than sufficient to support the Director's "reasonable cause" burden; the district court did not abuse its discretion in rejecting this additional evidence or declining a new evidentiary hearing. *See Gottfried v. Frankel*, 818 F.3d 485, 493 (6th Cir. 1987).

The Company also contends (Br. 53) that the Union pressured employees into signing cards and that this should be considered in weighing the coerciveness of the Company's conduct. The Company concedes that this "comparative

coercion" analysis is not part of the Board's *Gissel* analysis. (Br. 53 n. 6.) Its contention that this should be considered as a new element of that analysis is an argument to be made before the Board in the administrative case and to the Court on review of a Board decision. A proposed change in the law has no place in evaluating the district court's "reasonable cause" analysis, which is necessarily based on established Board law as it currently stands. Making a change in *Gissel* law is clearly outside the jurisdiction of the district court in the context of a § 10(j) case. Therefore, it could not have been an abuse of discretion for the court to have denied the Company a hearing for it to introduce evidence for this purpose.[8]

C. The District Court Correctly Determined that an interim *Gissel* Bargaining Order is Just and Proper

1. An interim bargaining order is necessary to prevent irreparable harm to employee rights and preserve the effectiveness of the Board's ultimate remedy

Although a majority of the drivers supported the Union at the outset of the organizing campaign, the Company responded by engaging in a series of serious unfair labor practices that quickly squelched that support. Thus, in less than a month after a majority of employees signed authorization cards, the Union decided to cancel the election because it believed that a fair election was no longer

[8] To the extent that the Company insinuates that the Union may have engaged in misconduct, the proper course of conduct would have been to file charges against the Union that the Director could have investigated and considered simultaneously with the charges against the Company.

possible. The Union's substantial loss of employee support occurred *after* the Company violated its employees' rights and is also compelling proof of the chilling success of the Company's anti-Union campaign. Once the Company began to commit unfair labor practices against its employees, the Union suffered a sharp decline in attendance at Union meetings, drivers began to fear losing their jobs if the Union won, and ultimately at least three of the drivers sought to rescind their authorization cards. (JA 46-47, 55-56, 68, 86-96, 228, 230).

The drivers' hesitancy to continue to support the Union campaign is compelling evidence of the chilling impact of the Company's unfair labor practices. *See, e.g., Electro-Voice,* 83 F.3d at 1572. Absent an interim bargaining order, this chill will remain in place during the pendency of the Board process and the Union's remaining support likely will continue to deteriorate as "working conditions remain apparently unaffected by the union or collective-bargaining." *Asseo v. Pan American Grain Co. Inc.*, 805 F.2d 23, 27 (1st Cir. 1986) (quoting *Int'l Union of Electrical, Radio & Machine Workers v. NLRB,* 426 F.2d 1243, 1249 (D.C. Cir. 1970)). By the time a Board order issues, not only will the Union likely have lost any employee support, but as a practical matter, it will be seen by employees as an outsider. Thus, the Union will be unable to rely on employees to support the Union's bargaining demands. In such circumstances, the Union is very unlikely to be able to negotiate a collective bargaining agreement on behalf of the

unit. *See Int'l Union of Electrical, Radio & Machine Workers v. NLRB*, 426 F.2d at 1249 ("When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees"). Thus without appropriate interim relief pending the outcome of litigation, the Company reaps two benefits; it successfully avoids bargaining with the Union and, even if it later is required to bargain, the Union will be too weak to bargain effectively. *Id.*

The Company attempts to minimize the employee statements of chill that James Young attested to in his affidavit. (Br. 29-30.) However, contrary to the Company' insinuation, his affidavit confirms the inherent chill resulting from the Company's unfair labor practices. As Young states, during conversations with three of his coworkers regarding the upcoming election, they expressed fear about supporting the Union. June Glennon told him that she was afraid of losing her job because if the Union won the election, Save-A-Lot would pull out. (JA 229.) Similarly, his colleague Jerome Baum told him that he was not going to even vote because he would lose his job if the Union won. (JA 230.) Another colleague, Bill Gates, who had not signed an authorization card, told Young that Save-A-Lot would cancel the contract if the employees unionized. (JA 230.) The fact that some employees mentioned in Young's affidavit continued to support the Union does not disprove the chilling impact of the Company's unlawful conduct on other

employees. *See, e.g., Pye v. Excel Case Ready*, 238 F.3d 69, 74-76 (1st Cir. 2001) (recognizing irreparable harm from the chilling effect of the employer's violations where "[a]t least some employees" were "afraid to act" in support of the union, despite evidence that other employees "felt 'totally uninhibited' in the exercise of their § 7 rights").

In addition, the absence of an interim bargaining order will irreparably deprive employees of the benefits of union representation while they wait for a Board order. The Board cannot remedy the potential loss in contractual benefits that results from the delay in bargaining. *See Levine v. C&W Mining Co., Inc.*, 465 F.Supp. 690, 694 (N.D. Ohio), *affirmed in rel. part*, 610 F.2d 432, 436-37 (6th Cir. 1979); *Asseo v. Centro Medico de Turabo, Inc.*, 133 LRRM 2722, 2729 (D. P.R. 1989), *affirmed*, 900 F.2d 445 (1st Cir. 1990); *Ex-Cell-O Corp.*, 185 NLRB 107, 110 (1970), *modified*, 449 F.2d 1046 (D.C. Cir. 1971), *enforced*, 449 F.2d 1058 (D.C. Cir. 1971) (Board will not award damages to unit employees because of employer's unlawful refusal to recognize and bargain with union; Board suggests "full resort" to 10(j) relief).

Finally, contrary to the Company's contention (Br. 56), the Company's coercive unfair labor practices here are precisely the sort of egregious conduct that warrants the imposition of an interim bargaining order. *See Kaynard v. MMIC, Inc.*, 734 F.2d 950, 952-54 (2d Cir. 1984) (interim bargaining order warranted

where employer threatened job loss and plant closure, granted benefits in advance of election, and terminated union supporter); *Palby Lingerie, Inc.*, 625 F.2d at 1054 (interim bargaining order warranted where employer, *inter alia*, unlawfully terminated union supporters and threatened plant closure); *Seeler*, 517 F.2d at 36-38 (interim bargaining order warranted where employer, *inter alia*, threatened employees with job loss and plant closure, granted benefits in advance of an election, and discriminated against union supporters in its rehire practices); *Scott v. Stephen Dunn & Assocs.*, 241 F.3d 652, 665-67 (9th Cir. 2001) (interim bargaining order warranted where employer granted wage increase in advance of election); *Pan American Grain Co.*, 805 F.2d at 24, 28-29 (interim bargaining order warranted where employer, *inter alia*, discharged union supporters, threatened job loss and plant closure, and granted wage increases). In these cases, Courts have acknowledged the necessity for interim *Gissel* bargaining relief to prevent the Board's ultimate remedial bargaining order from becoming a nullity.

2. The Company's argument concerning employee turnover fails; an interim bargaining order will also serve the public interest

Contrary to the Company's claim (Br. 35-45), alleged employee turnover and changes to the composition of the bargaining unit do not militate against imposing an interim bargaining order. Inasmuch as the Company cites to a difference of opinion between the Board and the courts of appeals as to the importance of employee turnover in considering whether to impose a bargaining

order, that difference has only arisen in the context of *final* bargaining orders, as the district court noted. (JA 368-371.) This distinction is important, as final Board orders and interim injunctions serve fundamentally different purposes. Whereas a final Board order aims to permanently remedy unfair labor practices, the purpose of an interim injunction under § 10(j) is to preserve the ability of the Board to issue an effective remedy at the conclusion of the administrative proceedings. *See Seeler*, 517 F.2d at 38 ("[S]ection 10(j) was intended as a means of preserving or restoring the status quo as it existed before the onset of unfair labor practices" (citing *Minnesota Min. & Mfg. Co. v. Meter*, 385 F.2d 265, 270 (8th Cir. 1967); *Hoffman*, 247 F.3d at 368 ("[o]ne of the underlying purposes of § 10(j) is to preserve the status quo in order to protect employees' statutory collective bargaining rights"). Indeed, by affirming the interim bargaining order now, this Court will assure the best chance of an enforceable Board order. Establishing an interim collective-bargaining relationship now may help stabilize the unit and reduce future turnover. More importantly, it will assuage concerns that the Court may have, on review, with the drastic change of imposing a bargaining order years later if, by then, there have been significant changes to the unit.

Moreover, one of the main reasons why this Court considers turnover relevant in deciding whether to enforce a final bargaining order is not applicable to § 10(j) cases. When reviewing a final Board order, this Court examines whether

there has been significant turnover to determine whether the changes in the workforce make it possible to conduct a fair election in the near future. But, in § 10(j) cases, denial of an interim bargaining order does not make way for a prompt election. A fair election cannot be held now, while the numerous coercive violations have not been fully and finally remedied. There will be no opportunity for the employees to exercise a free, uncoerced vote while the Company continues to contest the violations before the Board. Because an election is not an option at this point, the only meaningful interim remedy is a bargaining order. This Court on review of the final Board order may consider whether a remedial bargaining order or an election are more appropriate as the final resolution of the case. But denying an interim bargaining order will allow the harm from the violations to solidify, become permanent, and force the employees and the Union to restart their organizing efforts from an unlawfully disadvantaged position. Therefore, denial of an interim bargaining order based on current changes in the unit has a deleterious effect on any final resolution of the case, be it a final remedial bargaining order or a union representation election.

The Company is wrong to rely on *Paulsen v. Remington Lodging & Hospitality, LLC*, 773 F.3d 462 (2d Cir. 2014) in support of its argument that the district court abused its discretion in not considering the changed circumstances regarding employee turnover. *Remington* does not mandate consideration of

employee turnover in the context of an interim bargaining order. In fact, that decision does not address interim bargaining orders at all, but rather discusses the need for interim reinstatement of employees. Moreover, this Court's reason for considering changed circumstances in *Remington* is not applicable here. In *Remington* the employer had, *inter alia*, unlawfully terminated approximately 37 housekeepers in retaliation for their union activity. *Id.* at 466, 470. In concluding that interim reinstatement of those employees was not necessary, this Court relied on the fact that the employer had by then offered reinstatement to *all* of the housekeepers, many of whom accepted and returned to work. *Id.* at 470-71. Thus, the changed circumstance in *Remington* made an interim remedy unnecessary because it accomplished the purpose of that interim remedy: it helped to restore the status quo and preserve the Board's remedial authority. In contrast, consideration of the alleged changed circumstances here—employee turnover and expansion of the bargaining unit— in the manner advocated by the Company would only perpetuate the harm caused by the Company's violations and further erode the Board's ability to ultimately remedy the Company's highly coercive conduct.

In sum, contrary to the Company's contention, there is nothing in the case law that **required** the district court to consider turnover in the context of an interim bargaining order, and consideration of that factor in the context of interim relief would have negated the purpose of § 10(j) injunction to restore the status quo ante.

Accordingly, it could not be an abuse of discretion for the court to decline to consider it in this case.[9]

Finally, the grant of an interim bargaining order will further the public interest in fostering collective bargaining in order to achieve industrial peace. *Asseo v. Centro Medico*, 900 F.2d at 455 (if the goal of the labor laws and regulations is to strengthen the bargaining process, then ordering bargaining cannot be contrary to the public interest). It will also assure that unfair labor practices will not succeed because of the long administrative process. *Seeler*, 517 F.2d at 37-38 ("the public has an interest in ensuring that the purposes of the Act be furthered"). An interim bargaining order based on the Union's achievement of majority status serves the policy concerns of the Act. *Scott v. Stephen Dunn*, 241 F.3d at 669.

The Company has no basis for its protestation that the district court's bargaining order is "illegal" because it imposes a "minority" union on employees. There is no evidence that this is indeed a minority union; it is unfounded speculation. The fact that some of the original card signers are no longer working for the Company does not establish minority status. New employees may be

[9] Because, as discussed, employee turnover is not a necessary consideration for purposes of an interim bargaining order, the district court did not abuse its discretion in denying the Company the opportunity to present this evidence at an evidentiary hearing. (Br. 37.) In any case, the Company could have proffered evidence of turnover in documentary form, without the delay inherent in conducting a new hearing.

supportive of the Union; some of them may have since signed Union authorization cards. To the extent that there have been no new Union cards signed, or that Union support may have declined, it is impossible to now separate that result from the effect of the Company's conduct. Diminished Union support is more likely a result of the Company's serious misconduct than of turnover or genuine, uncoerced employee choice. Under these circumstances, current diminished Union support is not a basis for overturning the district court's injunction, nor does it make the bargaining order "illegal." *See Hoffman*, 247 F.3d at 369-370 (loss of support is no defense when it is the foreseeable result of the employer's own conduct).

In contrast to the serious threatened irreparable harm to the Board's remedial authority, the public interest, and employees § 7 rights in the absence of an interim bargaining order, there would be no meaningful harm to the Company from interim bargaining.

VII. CONCLUSION

For the foregoing reasons, the Board respectfully submits that this Court affirm the District Court's issuance of an interim bargaining order pending the outcome of the underlying administrative proceedings.

Respectfully submitted,

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April 6, 2015

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,577 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word 2007 in proportionally spaced, 14-point Times New Roman.

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Dated at Washington, D.C.
this 6th day of April 2015

ADDENDUM

STATUTORY ADDENDUM

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. Sec. 151 et. seq.

Section 10(j) (29 U.S.C. Sec. 160(j)):

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Respectfully submitted,

s/ Kyle Andrew Mohr
Attorney

Dated at Washington, D.C.
This 6th day of April 2015